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In the
Supreme Court of the United States

October Term, 1952

No. 326

THE GLENN L. MARTIN NEBRASKA CO., A CORPORATION,

Petitioner,

vs.

WREN L. CULKIN, GLEN WEST, FRANCIS H. MASKER, AND ALEX FEILMEYER, INDIVIDUALLY AND AS AGENTS AND REPRESENTATIVES TO MAINTAIN THIS ACTION FOR AND IN BEHALF OF ALL EMPLOYEES SIMILARLY SITUATED,

Respondents.

STATEMENT AND BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

As we view the matter there are just two questions involved in this proceeding and both involve only basic questions of fact. These are:

1. Is it necessary to plead and prove a contract, custom or practice when the activities involved, as in the present case, are substantially those of the regular workday of the employee?

2. Is there a conflict of holdings between the various Courts of Appeal of the different circuits?

FACTUAL STATEMENT

On pages 2 to 12, inclusive, of its printed Petition and Brief herein, Petitioner sets out a brief summary of the facts. A true understanding of the questions involved requires, we think, some enlargement on this statement. Also, it seems to us a rather peculiar procedure, to say the least, to turn, as Petitioner has, to the dissenting opinion of Judge Riddick of the Court of Appeals for the facts in the case rather than to the specific findings of the Trial Judge which, in turn, were likewise found and approved by the majority opinion of the Court of Appeals in this case.

These facts are important and must be kept in mind. This was a war plant engaged in the assembly and modification of many hundreds of war planes during the war. It was of the utmost importance that this highly important military endeavor be carefully guarded and protected every moment. Some 12,000 or 14,000 were employed on this seven hundred-acre enclosed plant area. They worked in three shifts around the clock, seven full days a week, day after week and month after month. It was of the utmost importance that fires be prevented

as well as that they be put out if and when one started. It was also of the utmost importance that throughout every hour and every minute of every hour, day and night, the entire plant be protected against sabotage, theft and disturbances of any and every kind. How well this was accomplished over the eighteen-month period here involved by these particular respondents is best shown by the fact, as correctly stated by Petitioner, that only one serious emergency occurred during all of this time; and that was when a plane flying in the air crashed through a roof of one of the buildings. There was hardly any way these Respondents could have prevented that.

There were twelve to fourteen firemen on each shift and usually from about forty to forty-eight guards on each of their shifts. It must be kept clearly in mind that not only the protective force but the entire plant force worked three full shifts so that the plant was in full operation day and night and every hour of the day and night during this period.

The facts are further detailed in the Supplemental Record forming a part of the record in this case. The Court's attention is respectfully directed to the headnote appearing on pages 1 and 2 of said Supplemental Record, all in explanation thereof.

The simple fact is this: These firemen worked primarily in the same manner as regular firemen in the fire department of a city or town, except only that here more watching and inspection are involved because of the particular hazards growing out of the work and type of work of this plant. The duties of the guards were substantially those of a regular town or city police officer

walking his beat, with some additional activities here due to the needs of the work and the large number of employees in this compact area and also involving some particular duties of watching and checking specific operations and some messenger service.

It is and always has been the position of Respondents that their activities during the so-called half-hour lunch period were almost exactly the same as during any other part of the day.

Before March 6, 1943, they ate their lunch at their post. Then the directive (page 4, Petitioner's Petition) was issued by the employer. Thereafter, *on paper* a different plan of operations was supposed to be followed by the guards. This, however, is a case to which the well-known statement that "It is a condition, not a theory, that confronts us" has full application.

It is not a question of what these Respondents *could* do in theory; it is a question of what, under direction of their superior officers and the compulsion of their work, they were required to do and *did*.

Briefly then, what are the facts?

As to the firemen, before March 6, 1943, all except the two or three out on inspection brought their lunch with them and at some available time around midshift ate their lunch at a table in the fire house. All were required to be in full uniform, even while eating. All were required to be ready at a second's notice to answer a fire call or other call to more active duty. Group by group they manned the crash truck and ambulance. The planes were flying in and out all hours of the day. This fact, together

with the great number of employees generally, necessitated frequent use of the crash truck and the ambulance. The two or three firemen on inspection, in addition to full uniform, were required to carry portable telephones. Before March 6, 1943, they could eat their lunch when and where they wished, still, however, being in full uniform and awake to their surroundings and with their portable telephones strapped over their shoulder. What change took place when this bulletin was issued on March 6? Exactly this and nothing more: thereafter instead of bringing their lunch the firemen, not on inspection, went one by one to the cafeteria next door, hastily picked up a tray of food, returned to the fire house and ate it there at the same table in exactly the same manner as before. The two or three firemen on inspection now ate in the cafeteria near which they might be at eating time. They still ate in full uniform, required to keep their caps on and their portable telephones over their shoulder and ready to answer any call, including plugging in their phones and answering signals flashed over the plant by a light system. Furthermore, meal time of itself with three to five thousand employees crowding into these cafeterias was a necessary and appropriate time for these firemen inspectors to be in a cafeteria checking and watching at the very moment they swallowed their bit of lunch. There is not even any claim of any witness in this entire record that any fireman ever found it possible to wander off to a locker room during a so-called lunch period. Where is there any difference between the *activities* of these firemen during the so-called lunch period and their regular required activities during every other hour of their regular workday? Throughout all the long history

of this litigation counsel for Petitioner has entirely failed to point out one iota of difference save only that during the lunch period, when it was not interrupted, the firemen, in addition to their regular activities, chewed and swallowed a little food; but without at the same time giving up or leaving any of their regular duties or activities.

Petitioner repeats and repeats the statement that these employees were only interrupted in their actual lunch period on rare occasions. If they had never been actually interrupted by a fire, it would not be important. Is a city fireman on duty and performing his regular activities entitled to pay only while he is answering a fire call or fighting a fire? That seems to be the position of Petitioner here. Of course, this is not the practice. Anyone is familiar with the fact that regular firemen spend much of their time just sitting around the fire barn either reading or playing cards or listening to a radio, being, however, alert to answer immediately to a fire call.

The same considerations exactly apply to these guards. A policeman on his beat may actually stop a disturbance, catch a burglar or make an arrest only once in a month. His purpose and his presence in walking his beat in full uniform is to prevent law violation. The same is true of these guards. It is undisputed in this record that they, and every one of them, were specifically required by direct orders of their superior officers to remain in full uniform throughout every minute of this 8½-hour shift period. Certainly some of them could go to the cafeteria and eat their lunch there but on the way to and from the cafeteria and while in the cafeteria they, too, were re-

quired specifically to remain in full uniform and were not permitted to remove their cap or insignia or gun even while sitting down to swallow a little food.

Furthermore, and again remembering that during the lunch period four or five thousand employees crowded into these cafeterias, it was most appropriate that guards in uniform walk in and out of the cafeteria and that some of them be there among all of these other employees. It is a matter of common social knowledge that disturbances, thefts and other law violations occur more generally in such crowded conditions than elsewhere. It is true that on some occasions a guard was stationed at one door of one of the cafeterias as a regular guard post, but one guard in that position could not possibly serve the need of guards throughout all of the cafeterias with all of these employees eating there. It should also be remembered that the cafeterias were only open for lunch about an hour and a half, midway in each shift, and all of these employees had to crowd in there and eat during that brief period.

Incidentally, there were three cafeterias, not five. Two of theme were divided into two sides or divisions but they were still only two large adjoining rooms and not separate cafeterias.

Only two or three rovers were furnished to relieve all of these guards. It was the plan that the others were to "relieve themselves," whatever that meant. It does not appear just who was to relieve a guard who was relieving another guard. Again, it is a matter of common social knowledge that saboteurs, and there were some during the war, would watch a plant and determine

when it was weakly guarded and perform their acts of sabotage during such period. Petitioner knew this very well. That was the basic reason for the change from 8 to 8½ hours beginning March 6, 1943; that is, so that no part of the plant would remain unguarded even briefly at the time of changing shifts. Exactly the same considerations applied during the so-called lunch period.

Again on paper, according to this directive, these guards *could* do this and that. They *could* go to the locker room or be at ease. But *did* they? Was it possible as an actual matter of fact and practice for them to so be at ease? Petitioner has had and has the names and addresses of all of their employees. Not a single one of them was called as a witness by Petitioner to show even a few incidents when any of these guards would be found lying around at ease or loafing in the locker room during the so-called lunch period. In fact, as stated by one of the witnesses, the locker doom was too far away from practically all of them to even have time to walk there and back in a half hour.

We will not prolong this statement by quotations from the specific findings by the Trial Judge which will be found in the Record and which the Court will want to read in full, anyway. We do call attention to this fact: Trial of this case was started in February, 1948, after many previous arguments on pleadings, etc. After several days trial, the Trial Judge became temporarily indisposed and it was necessary to adjourn the trial for a time. Then other matters developed, including litigation over the country in other cases, and the trial was not resumed until July, 1948. Then the evidence was heard

over a further period of more than two weeks. Then briefs were filed and matters presented from time to time in connection with legislation and opinions of this and other Federal Courts. Thus, over a long period of time the Trial Judge had all of these matters under consideration repeatedly, and in detail. If there ever was a case in which Rule 52 of the Federal Rules of Civil Procedure should be strictly applied, this is such a case.

Petitioner repeatedly refers to what it calls "the undisputed evidence." The only factual point in the evi dence not disputed is the fact of the issuance on paper of the directive of March 3, 1943, effective March 6, 1943. There is extensive and detailed dispute in the record in the way of the evidence of Respondents as to what actually happened, notwithstanding this paper directive.

Petitioner draws some support from the above mentioned dissenting opinion of Judge Riddick, and particularly the last portion thereof appearing on page 11 of Petitioner's Petition and Brief. With all due respect to Judge Riddick there is an obvious basic error in his reasoning and his conclusions. He seems to have been influenced considerably by the fact, as he states, that only 12 of some 250 plaintiffs were called to testify. This point was never raised, at least by way of dispute, at any time during the trial or the appeal to the Court of Appeals or the argument in the Court of Appeals. Therefore, there was no occasion to call the attention of Judge Riddick to the true picture in this connection. Until his dissenting opinion was written and published there was no thought of any question on this point. The simple fact is that at the trial this matter was covered by a statement in

open court at the close of Respondents' case and was not questioned by the Trial Court or counsel for Defendant and Petitioner. The statement made by the trial attorney for Plaintiffs and Respondents is found on page 158 of the Record. Perhaps the language and the English employed could be improved upon, but we quote this statement exactly as it was made. It was our position then, and it is our position now, and as stated was never questioned until Judge Riddick, apparently without having noted this statement, wrote his dissenting opinion. The sttaement is this:

> "MR. MURPHY: Now, if the court please, I would like permission to have the record show this very brief statement, and that is in support of our theory of proof of this case. As outlined in procedure in many other cases, we have called representative employees, old and young, guards and firemen, men and women, particularly a number who were there throughout the entire period; covered the general picture; many of the individual situations; the particular situation with respect to some that were not in the ordinary line of work of the general run, so that as I view the evidence thus far adduced by these witnesses covers the entire picture of the employment as to all parties of the case, and that any further witnesses or testimony would be merely repetition and unduly extend the record and that is our theory at this time, and the plaintiffs rest."

Thus, it is necessary to multiply the testimony of each of the 12 witnesses by 3 to cover each shift and by the additional number of guards on some posts. Again, with all due respect to Judge Riddick, we insist the Record shows a great many specific instances of calls to active duty during the lunch period. Furthermore, we

are sure the Record in no instance shows any witness stating that unless called to duty he had an uninterrupted thirty minutes for lunch or that if interrupted by call to duty he could return to lunch at a later period. In this connection, attention is again directed to the plain fact of the evidence and that is that when any witnesses, in answer to questions upon cross-examination, made any statement to the effect that they *could* have a half-hour lunch period or that they *could,* if interrupted, return at a later period, they were referring specifically to the paper directive. Each and all of them made it abundantly clear that this did not work out in practice. When returning after an interrupted lunch period, the cafeterias would be closed. Also, we fail to find in the Record support of Judge Riddick's statement that "only one witness testified that he was always on duty throughout the lunch period." Every one of these twelve witnesses testified not only that he but every other guard and fireman on every shift "was on duty throughout the lunch period." Also, we fail to find the contradictory evidence referred to by Judge Riddick. The simple fact is, as the Record discloses without dispute, that even the few witnesses called by Petitioner, with only one exception, fully corroborated the testimony of all Respondents' witnesses to the effect that they were on full duty throughout the entire 8½-hour shift, including the so-called lunch period.

The contradiction referred to is only apparent; not real. Respondents' witness, John E. Kerwin (Supp. Record 16), testified he had to *read* the water record every twenty minutes and *report* it every hour. Incidentally, he testified that this was true as to all three shifts on that particular post. None of the other men who worked that

post were called by Petitioner to dispute this in the least. Petitioner does a lot of talking about this guard post not being interrupted because they only had to *report* the water reading once an hour. But that isn't the point. The point and the undisputed evidence is that they had to *read* it every twenty minutes and this was true during any lunch period as well as at any other time.

Without further prolonging this discussion of the facts, we think it might be advisable to quote in detail from the Record, the testimony of Respondents' witness, Alex Feilmeyer. Petitioner on page 58 of its Brief refers to some brief excerpts of the testimony of this witness and on page 60 of its Brief to very brief excerpts from the testimony of the above mentioned witness, John Kerwin. These are perfect examples of lifting a few words out of the context. The testimony of Alex Feilmeyer in its entirety is typical of the testimony of all of the other witnesses and applicable to a considerable extent to all posts on all shifts. It covers this point of number of interruptions. It will be noted that far from failing to remember any interruptions, he testifies specifically that these would occur at least three or four times a week and that he was unable to get back and eat his lunch later and finally had to just quit eating any lunch at all. His testimony also covers the undisputed instructions of the superior officers to all guards. It also covers the complaints made by these employees during this eighteen-month period until Petitioner began paying for this lunch period after being called upon by representatives of the Wage and Hour Division. It will be remembered that the references to particular pages and lines refer to the primary record so that this narrative statement could easily

be checked. The testimony of Mr. Feilmeyer (Supplemental Record 7, 8, 9) is as follows:

"ALEX FEILMEYER, witness called on behalf of plaintiffs. Employed continuously as guard from August, 1942, to April, 1946, and having worked all three shifts, usually as guard at main gate.

Direct Examination—page 137, line 16 to page 143, line 18.

"I knew about the order issued on or about March 6, 1943. Up until then I had brought my lunch and ate when and where I could and was paid full time, irrespective of where I ate. Beginning March 6, 1943, we were to be relieved by a guard. You would go to the cafeteria and get your lunch and either take your lunch and eat it there, or eat it on the post; either way. We were instructed that in case our light went on, or anything, it was our duty to phone in and find out what the order was, and if there would be an emergency we were supposed to leave our lunch and take care of whatever it might be and then go back, and so on. There were signal lights at the cafeteria up at modification. The light would flash quite frequently. I would say three times a week, maybe four. On the first shift it was worse than the second and third. If the light flashed you would go to the phone and if it was probably someone quitting, or you had to pick up someone at the plant, you would have to leave your lunch and go up and get whoever it was and bring them back and go down and eat, if you had time to go back. On the first shift I would leave my lunch quite often. Finally, I just quit taking my lunch at all and would eat when I got home, because I wouldn't have time to eat. It seemed like during the first shift there was generally a lot of activity there and that was the reason I forgot my lunch entirely.

"We had side arms and under instructions from our officers, who were civilian officers, we wore these at lunch. We also had a cap with insignia on it and we were not permitted to leave that off when we went to lunch. These instructions were from our officers. This continued right along after March 6, 1943, and on after September 16, 1944. I remember the date of September 16, 1944, and that following that we were paid for 8½ hours. There was no change, as a matter of actual fact, in our way of working on or about September 16, 1944, either as to the lunch situation or anything of that sort. The officer I referred to was Captain Berry. He was a civilian captain; not an army captain. I talked with him ten or twelve times about this lunch situation over the period from March 6, 1943, to September 16, 1944. He told me I was on duty at all times whether I was in the cafeteria, or out; even though I was relieved, in case someone was in the cafeteria and didn't have a badge on, it was my duty to see where the badge was, or their identification; if any trouble would arise while I was in there, it was my duty to try and straighten it out; or, if I was subject to call, in case the light went on and I had to call in, and I brought that up to him, I imagine, ten or twelve times."

Page 147, line 16 to page 148, line 13:

"I told Captain Berry I thought we should get paid for the half-hour, as we were on duty and had to check badges, and so on, and then be called in case the light went on and gave us some duties to perform and we would have to go and drop our lunch and come back later and eat it. That was the kick I had about it, that our half-hour wasn't our own. He told me he didn't have anything to do with that, but as long as we had that badge on we were on duty. He said he couldn't do anything about the pay check. The men, through an organization, were

making complaints about the fact that our pay was not being based on 8½ hours. I never did agree with Martin, or anyone else, that I was entitled to only 8 hours pay for that period of time."

Cross-Examination—page 162, line 13 to page 164, line 6:

"If I was called out, no record of that would be made. I would just have to pick up my lunch some way. A lot of times I wouldn't, after I came back. I remember being called out while at lunch on many more than four or five times altogether. I would be called to go up to the plant and pick up a vendor, or there would be a group of people quitting and I would have to go and take them through the plant, and so on and so forth, and sometimes on some days that would be all day long; there would be people quitting on Fridays, especially, or some vendor would come in the plant and they would tell me to go and pick him up. A vendor is a person who would contact some of the purchasing departments and we would have to pick them up at the gate and maybe the other guards would be tied up and they would say, 'You have to go. They are waiting for you.'"

Usually four guards were posted at this particular gate. Thus, the testimony of this one witness covers the individual similar experience of twelve men; that is, four men on each of the three shifts per days of twenty-four hours. The testimony of all of these witnesses was submitted and received in such similar representative capacity in keeping with the uniform practice in cases of this type.

Petitioner submitted officers' daily report for August 16, 1944, as representative of these daily reports. This covers the day shift for that day (R. 203). Now the

lunch period for that particular day was 10:30 A. M. to 12:30 P. M. (R. 160). Yet this particular report of August 16 shows a fire call to which the fire department employees responded from 10:55 A. M. to 11:45 A. M. Thus, on the only occasion which Petitioner furnishes us with their own records it appears that the firemen were actually on a fire call during fifty minutes of their supposed lunch period. It might be argued from this that this was a daily occurrence but, of course, we make no such argument. It was not a question of whether they were actually out fighting a fire every other day or so during the so-called lunch period. The point is that the fires occurred irrespective of the time of day or night and they accepted fire calls exactly the same during the so-called lunch period as on any other occasion. That was what they were there for. That was their regular workday activity along with the inspection work and other similar matters.

Petitioner states on page 30 of its Brief that none of the other 10,000 or 12,000 employees were paid for their lunch periods. So far as we know that is perfectly true. But it was not the custom or practice of the mechanics, welders, bookkeepers, etc., to continue their regular work during the lunch period. Without question they had a perfectly free half-hour lunch period except only that they could not leave the plant area. We have never contended that the mere fact that these guards and firemen could not leave the plant area would make them eligible for pay during the lunch period.

Petitioner further states on page 62 of its Brief that "It was not until long after the war was over and long after the plant was closed that claim was made to the effect that these men were to be paid for this lunch

period." This statement is quite in keeping with the repeated statement of Petitioner as to "undisputed evidence." Now the simple fact is as shown without dispute by the above quoted testimony of Alex Feilmeyer, and other witnesses testifying likewise, all of these employees complained throughout the period of March 6, 1943, to September 16, 1944, that they were not being paid for this lunch period and made claim for such pay. If our memory of recent history is correct, and we have reason to remember it very definitely, the war was in full force during these months. This suit was originally instituted in January of 1945. The war was still very much with us at that time and for several months thereafter. The plant was not closed until September, 1945, or more than two years after these claims were first made and nine months after this suit was first filed. Respondents are in no way responsible for the many and long delays that occurred in this litigation thereafter.

There is just one other factual situation we wish to discuss before passing on to a review of the authorities.

Petitioner relies almost entirely upon opinions of a few courts which, however, were in cases involving the two-platoon system. It should be remembered that at all times in the present case there were three regular daily shifts. This was true of the entire plant. There was no closing down of any department during the night or at any other time. This two-platoon system, limited almost entirely to firemen, was used in some instances in other plants. Mostly these were packing house plants. Invariably those plants operated only one or, at the most, two shifts per day. During at least 8 hours over the night

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period the plants were closed and inoperative. Thus, during this night period there was no fire danger resulting from plant operations because there were no operations. The presence of any outsider could be readily detected in the quiet of the night. Such was not the situation in the present case. In those two-platoon system cases generally the courts allowed a workday of 16 hours. It is true that in some instances the courts speak in passing of deductions from working time of "sleeping and eating time." In none of these cases was any particular point made of the eating time. Under this two-platoon system one complete group worked a full 24 hours. Then that group would be off and the other platoon on duty the next 24 hours. That is, each worked alternate 24-hour straight periods. The members of each platoon, of course, had to sleep during that 24-hour period. While many of us get along on less than 8 hours sleep a day, yet we think it is quite well recognized that particularly among men and women engaged in manual labor, 8 hours sleep is the normal thing. Now, as stated, the courts, in these two-platoon system cases, allowed pay for 16 hours. Thus, as a matter of fact, even in those cases the employees were considered as being on duty and entitled to pay during their so-called eating time. Even if we reduce the sleeping time some it should be remembered that there are three meal periods in each 24 hours. Limiting each to the minimum of ½ hour means 1½ hours per day. If this is included in the 8-hour period mentioned then it left only 6½ hours sleeping time. If 8 hours is a little more than necessary as actual sleeping time, 6½ hours just as surely is too short an allowance. We repeat, therefore, that even those cases when ana-

lyzed are found to have allowed at least a portion, if not all, of the eating time as regular compensable working time.

There is no similarity between the situation as to activities in those two-platoon system cases and the activities in the present case. Of course, in those two-platoon system cases the employees performed none of their regular activities during this 8-hour night period whether we call it sleeping time or eating time, or both. At least we find no indication in any of the court opinions in those cases that, contrary to the laws of nature, those employees during that night period slept standing up on their feet in full uniform and with their eyes open.

PROPOSITIONS OF LAW

At the outset of this discussion we call attention to the fact that Petitioner rests its claim that this Court should review this case upon the proposition that there is a conflict of holdings between the various circuits; and particularly that the Second, Third, Fourth and Ninth Circuits hold contrary to the Eighth Circuit in this case and in the case of *Central Missouri Telephone Company v. Conwell,* 170 Fed. 2d 641. It is further the contention of Petitioner, as we understand it, that the Courts of these four circuits hold that it is necessary to plead and prove a contract, custom or practice even though the activities involved are those of the normal workday.

We shall demonstrate the falsity of these propositions. We shall demonstrate clearly by an analysis of

Petitioner's authorities and the citations of and quotation from recent opinions of the Courts of Appeal of three of these four circuits that far from there being any conflict, those Courts of Appeal approve and follow the present case and the aforesaid *Conwell* case. The result is that there simply is nothing whatever in this case requiring or even indicating any necessity for the granting of the Petition for Writ of Certiorari or the consideration of this case by this Court.

This proposition, while not proven, is certainly indicated by the fact that Petitioner is required to fall back almost entirely upon District Court opinions and, in fact, two State Court opinions. Following the adoption of the Portal to Portal Act there was something of a flurry of District Court opinions arrived at apparently under the mistaken idea that the Portal to Portal Act repealed the Fair Labor Standards Act. Of course, that was found to be far from the truth. Mature consideration of the problems involved has resulted in uniform holding of the Courts of Appeal of every circuit in the country where the issue has been squarely presented. We repeat, there remains nothing for the consideration and decision of this Court.

The position of Petitioner in this matter, as we understand it, is based primarily upon its contention that it is necessary to plead and prove a contract, custom or practice even though it be found that the activities involved are not portal to portal in character.

We think the Amended Complaint in the present case alleges and the evidence proves such contract, custom and

practice but we do not rest our position on this proposition alone.

It is conceivable that a situation might arise in which the activities involved were not exactly portal to portal in character and yet were not the normal activities of the regular workday. In such a situation perhaps it is necessary under Section 2 of the Portal to Portal Act to clearly and specifically plead and prove such contract, custom or practice, but that is not the situation here. In the present case the findings of the Trial Court and the Court of Appeals are not simply that these activities were not portal to portal in character. The decision in the present case is based rather upon the affirmative finding that the activities of these Plaintiffs and Respondents during this half-hour so-called lunch period, were the regular activities of their normal workday.

In the very nature of things it necessarily follows then that there was a contract and that it was the custom and practice to pay for such activities. It should be remembered that the language of the Act is the "activities"; not the time of day or the name given to some particular period of the day. When one enters into the employ of an employer there is always necessarily a contract under which the employer agrees to pay the employee for the time the employee devotes to the employer's service in the activities covered by the employment. It is always the custom and practice to pay the employee for such activities and for all the time devoted to such activities. The only alternative is employment without pay. We think this type of relationship was terminated

permanently by the Thirteenth Amendment to the United States Constitution.

The basis of the present decision and the rule of law now uniformly adopted in all circuits, so far as we can determine, is based upon the affirmative findings as above mentioned. In the present case these findings of the Trial Court, after long and careful consideration and as affirmed by the majority opinion of the Court of Appeals of this, the Eighth Circuit, are found particularly in that portion of the Trial Court's opinion found in the first full paragraph on page 71 and the latter portion of the last paragraph on page 71 and extending over to page 72 of the Record. We quote:

> "This view, that Section 2 of the Portal Act is directed against claims for compensation for activities such as dressing work, traveling within the plant to job location, etc., which are different from the *activities which comprise the regular normal part of employment* and that the section has no application where the work for which compensation is being claimed is the same kind of work as was performed throughout the remainder of the workweek, has also been accepted by courts in other circuits.
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> "Whether the time is Portal-to-Portal time depends upon the nature of the activity engaged in during the period in question; and not upon the term by which the period is known. *The evidence in this case clearly establishes as a matter of fact that during the 'lunch periods' in question, the employees were engaged in the principal activity of the workweek* and were not merely taking care of preliminary or postliminary matters. This being so, the court has

concluded that Section 2 of the Portal Act is inapplicable to this case and that the plaintiffs are not required to plead and prove a contract, custom or practice to compensate them for the hours worked during the lunch period." (Emphasis added.)

On page 32 of its Brief, Petitioner discusses the case of *Battaglia, et al. v. General Motors Corp.*, 169 Fed. 2d 254. This is Petitioner's supposed authority for their position with respect to the Second Circuit. Also in this connection Petitioner, on page 36 of its Brief, discusses and apparently lays great stress on the opinion of the District Court of Maryland in the Fourth Circuit in *Seese v. Bethlehem Steel Co.* This case was appealed and the Court of Appeals opinion is found in 168 Fed. 2d 58. We will discuss these two cases together and follow them in later decisions and thus, as stated, demonstrate clearly and beyond question the complete lack of foundation for Petitioner's position in this present matter.

It takes much stretching of the imagination to find anything in this *Battaglia* case from the Second Circuit which in the slightest degree supports the position of Petitioner. As especifically stated in the opinion, the claim there was for activities *"preliminary to, and after engagement in, the principal activities of the employees."* That is the direct opposite of the situation in the present case. It is perfectly true that in the opinion, referring to the activities generally and after detailing these activities *"before and after their main activities,"* passing reference is made to "lunch and rest periods during which their time was not entirely at their own disposal." However, just what activities were involved in that connec-

tion is not disclosed. Probably it was only that the employees could not leave the premises. As above stated, we make no claim here on that point.

The important point, however, in connection with this *Battaglia* case is that the only point actually presented and argued and decided in the Court of Appeals was the question of the constitutionality of the Portal to Portal Act. Nothing more can be read into that opinion no matter how hard one may try.

In the above mentioned *Seese* case from the Fourth Circuit, again the only point actually presented, argued and decided was the constitutionality of the Portal to Portal Act. Little is said about the activities involved but from what is said it is at once perfectly clear that these were portal to portal in nature and by no stretch of the imagination could they be considered as normal activities of other portions of the regular workday. In fact, the opinion specifically refers to the activities involved in the following language:

> "* * * but recovery is asked solely on the ground that plaintiffs were required to be on the premises of defendant before and after working time for the purpose of changing clothes and walking to and from the place where the work was carried on."

But we are not left to mere speculation as to what the courts hold. There is a later case from the Fourth Circuit which involved the original issues in the present case. This is the case of *United States Steel Co. v. Burkett, et al.*, 192 Fed. 2d 489, decided less than a year ago on November 5, 1951. Again we emphasize that this case is from the Fourth Circuit. That is the same Court that

decided the *Seese* case. In this *Burkett* case the Court of Appeals of the Fourth Circuit cited with approval and followed the *Conwell* case from this Eighth Circuit, that is, *Central Missouri Tel. Co. v. Conwell,* 170 Fed. 2d 641, and adopted exactly the same rule and followed exactly the same reasoning as did both the Trial Court and the majority opinion of the Court of Appeals in the present case. Furthermore, this Court of Appeals of the Fourth Circuit in this *Burkett* case specifically distinguishes between cases where the activities were of the nature involved in the present case, that is, substantially normal activities of the workday, on the one hand, and cases such as the *Seese* case and the *Battaglia* case in which the activities were strictly portal to portal in nature. In this *Burkett* case claim was made by foremen who were required by the employer to report one-half hour before the regular starting hour and to remain ten minutes after the regular quitting hour for the purpose of handing out slips and doing other tasks which were of the same nature as those performed during the regular portion of their workday. There was no contract, custom or practice to pay these foremen for these periods. The Trial Court found, of course, that there was the usual oral contract to pay them for actual time worked, including any overtime devoted to their regular duties or activities. The opinion cites numerous cases and covers the question fully. Therefore, and without going into more detail, we quote from the opinion the following rather lengthy excerpt because we are sure this is the settled law in all circuits where the point has been raised:

> "The overtime work which plaintiffs did was not a matter of reaching the place of work or of personal

preparation, but was normal work of the employer of the kind for which overtime compensation was provided by the contract of employment. With respect to this the District Judge found: '5. There was an express oral contract between the defendant and the plaintiff to pay the plaintiffs for any overtime which they worked as a part of their duties in the capacity in which they were employed, and the thirty minutes before the regular shift and the ten minute period after the regular shift were made compensable by an express contract when the plaintiffs were employed as turn foreman.'

"The District Judge held that upon these facts the plaintiffs were entitled to recover wages and overtime for the 40 minutes work done before and after their regular shifts and that they are not barred of recovery by reason of section 2 of the Portal-to-Portal Act, 29 U. S. C. A. No. 252. We think that this was clearly correct. We are in accord with what was said by the Court of Appeals of the Ninth Circuit in Biggs v. Joshua Hendy Corp., 183 F. 2d 515, 520, as follows: 'Cross-appellants further contend that work performed by appellants during lunch periods cannot be the basis for recovery under the Fair Labor Standards Act by reason of No. 2 of the Portal-to-Portal Act, 29 U. S. C. A., No. 252, because such work is not made compensable by the express provision of a contract within the meaning of No. 2(a) (1). That section is directed against claims for compensation for activities, such as dressing for work, traveling within the plant to the job location, etc., which are different from the activities which comprise the regular, normal part of the employment. The section has no application where, as here, the work for which compensation is being claimed is the same kind of work as was performed throughout the remainder of the workweek.'

"As was well said by Judge Rifkind in Galvin v. National Biscuit Co., D. C., 82 F. Supp. 535, 537:

'Neither contract nor custom can open an avenue of escape from the obligations imposed by the Fair Labor Standards Act, 29 U. S. C. A. No. 201 et seq. A contract may not validly dictate that eight hours work shall be calculated as seven hours.' See also Frank v. Wilson & Co., 7 Cir., 172 F. 2d 712; Joshua Henry Corp. v. Mills, 9 Cir., 169 F. 2d 898, 900; Smith v. Cleveland Pneumatic Tool Co., 6 Cir., 173 F. 2d 775; Michigan Window Cleaning Co. v. Martino, 6 Cir., 173 F. 2d 466; Central Missouri Tel. Co. v. Conwell, 8 Cir., 170 F. 2d 641, 645. As said by Judge Gardner in the case last cited:

" 'In the instant case there is no claim seeking to recover for time consumed in walking to work or other activities either before or after the normal working hours. Here the claim is that these employees actually worked many hours in excess of the forty hours permitted by the Fair Labor Standards Act, not for activities of a Portal-to-Portal nature, such as were involved in Anderson v. Mt. Clemens Pottery Company, supra (328 U. S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515), and we agree with the trial court that it was not the purpose of the Portal Act to destroy such claims.

" 'Section 207 of the Fair Labor Standards Act provides that, "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—* * * for a workweek longer than forty hours * * *, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.' "

" 'We are of the view that this provision of the Fair Labor Standards Act was neither repealed nor so modified as to make it necessary to plead, in an action to recover compensation for time actually de-

voted to the normal work for which the employee was employed, an express written contract or unwritten contract, or a practice or custom. Jackson v. Northwest Airlines, D. C. Minn., 76 F. Supp. 121. The court therefore had jurisdiction of the action and properly denied defendant's motion to dismiss.'

"There is nothing to the contrary in our decision in Seese v. Bethlehem Steel Co., 4 Cir., 168 F. 2d 58, 64. That case involved claims for time of changing clothes and walking to and from the place where work was carried on, not the doing of work of the employer of the very sort that the employees were hired and paid to perform. The holding of the case was that Congress had not violated the Constitution in denying recovery for 'claims of purely statutory origin, claims given by statute not as compensation for labor performed but as a means of regulating wages and hours of work in interstate commerce.' What we held to be stricken down by the Portal-to-Portal Act were 'claims * * * not based on contract, custom or practice.' There is nothing said in the case which would prevent recovery of wages or overtime compensation for work and labor performed as here in regular line of duty and under the regular contract of employment in excess of the hours permitted by the Fair Labor Standards Act."

This, we think, fully disposes of the claim of Petitioner that there is any conflict between this Eighth Circuit in this case and the *Conwell* case and either the Second or the Fourth Circuits. Let us turn then to the Ninth Circuit, in which jurisdiction Petitioner claims there is such conflict.

There is a fairly recent case from that circuit which is the latest word on the point in that circuit. This is the case of *Biggs, et al. v. Joshua Hendy Corporation,* 183 Fed. 2d 515. It will be observed that this Court of

Appeals of the Ninth Circuit in this last mentioned case cites, and we think correctly, as the basis for its holding, two of the opinions of this Court which Petitioner pretends to rely on for some support for its position. These are the cases of *Armour & Co. v. Wantock,* 323 U. S. 126, and *Skidmore v. Swift & Co.,* 323 U. S. 134. Following is the language of the Court in the above mentioned *Biggs* case:

> "Cross-appellants further contend that work performed by appellants during lunch periods cannot be the basis for recovery under the Fair Labor Standards Act by reason of No. 2 of the Portal-to-Portal Act, 29 U. S. C. A., No. 252, because such work is not made compensable by the express provision of a contract within the meaning of No. 2(a) (1). That section is directed against claims for compensation for activities, such as dressing for work, traveling within the plant to the job location, etc., which are different from the activities which comprise the regular, normal part of the employment. The section has no application where, as here, the work for which compensation is being claimed is the same kind of work as was performed throughout the remainder of the workweek.
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> "Appellee's final contention on cross-appeal is that there is insufficient evidence to support the finding of the trial court that appellant Biggs worked during all of his lunch periods. We think the evidence sustains the finding. He was on call at all times and time thus spent was compensable under the Fair Labor Standards Act. Armour & Co. v. Wantock, 1944, 323 U. S. 126, 65 S. Ct. 165, 89 L. Ed. 118; Skidmore v. Swift & Co., 1944, 323 U. S. 134, 65 S. Ct. 161, 89 L. Ed. 124."

We turn again to some more of the supposed authorities relied upon by Petitioner. Let us examine *Bauler*

v. Pressed Steel Car Co., 182 Fed. 2d 357, from the Seventh Circuit. Here again we must go back to the basic question of fact. That is the point of this entire proceeding. Once the facts are determined then the law is well settled and there is no conflict. The Trial Court and the majority opinion of the Court of Appeals in the present case determined the facts. We do not understand that it is the desire of this Court nor, in fact, usual recognized procedure to grant a writ of certiorari merely for the purpose of reviewing and redetermining a question of fact. Yet that is what Petitioner, in actual effect, is asking this Court to do in this present procedure.

Here again in this *Bauler* case as a matter of *fact*, the activities involved were portal to portal in nature and were not, as found and determined in the present case, the usual and ordinary activities of the regular workday of the employee concerned. The facts are summarized in the opinion in the following language:

> "The work for which they seek overtime compensation under the Fair Labor Standards Act consisted in marching to and from their respective posts of duty, in a military manner, changing their attire from civilian dress to guard uniforms, or from guard uniforms to civilian dress, cleaning their equipment and examining the bulletin board."

Boerkoel v. Hayes Manufacturing Company, 76 Fed. Supp. 771 (D. C. Michigan), is another supposed authority relied upon by Petitioner. This, as stated, is a District Court opinion. It is not clear from the opinion just what activities were involved. Therefore, the case can be of no help. But above and beyond that point we call at-

tention to a recent opinion of the Court of Appeals of that Sixth Circuit.

F. W. Stock & Sons, Inc. v. Thompson, 194 Fed. 2d 493, from that Sixth Circuit decided as late as February 7, 1952, fully and completely supports the position of Respondents in this proceeding. Far from there being any conflict, the Court of Appeals in this *Stock* case cites, approves and follows the above mentioned *Conwell* case from this Eighth Circuit and the *Biggs* case, also above cited and discussed. While the employees in this *Stock* case were not guards or firemen but rather engineers, yet their activities during a so-called lunch period were involved in much the same manner as in the present case. There again the Court of Appeals of the Sixth Circuit held that since during the so-called lunch period and notwithstanding orders and directives, the employee was, as a matter of fact, required to continue substantially his regular duties even while he ate a bit of lunch, it is not necessary to plead or prove a contract, custom or practice to treat such periods as compensable working time.

Turning again to the cases cited by Petitioner we find two State Court opinions, being those of *Cobb v. Aluminum Co. of America,* 226 S. W. 2d 110, and *Kemp v. Day & Zimmerman* (Iowa), 33 N. W. 2d 569. Neither of these cases as we read them give due consideration to the basic question as to the activities involved and whether or not these activities are those of the normal workday; that is, the activities which the employee was hired to perform. Furthermore, and with all due respect to these State Courts, we cannot see where these opinions, in any

event, enter into the present picture; that is, proceedings in connection with petition for writ of certiorari.

Next, let us examine Petitioner's supposed authority, *Jax Beer Co. v. Redfern,* 124 Fed. 2d 172. This case was decided December 10, 1941, or several years before the Portal to Portal Act was adopted. It could not possibly, therefore, be any authority on the real issues in the present proceeding. Petitioner apparently cites it in the way of grasping at a straw on the theory that this Court should review the facts in the present case. It is true that the Court of Appeals in this last mentioned case found that the evidence as to material facts was so uncertain as not to constitute substantial basis for the judgment. That was a proper point to be examined and determined by the Court of Appeals. But in the present case, not only the Trial Court but the Court of Appeals in the majority opinion has found that the evidence *clearly* established the fact that these employees during the so-called lunch period were engaged in performing the regular and normal activities of their employment. We do not understand that it is the policy of this Court under the law to review findings of fact so established.

Love v. United States Rubber Company (D. C. Pa.), 92 Fed. Supp. 174, cited by Petitioner is a two-platoon system case. We have discussed the situation in these cases earlier in this brief and will not repeat that discussion here. There just is nothing in this Love case that supports Petitioner's position.

Redwitz v. Ford Motor Co. (D. C. Ky.), 80 Fed. Supp. 265, is another of Petitioner's supposed authorities that just isn't any authority in this proceeding. There again

the only point actually presented, argued and decided was the constitutionality of the Portal to Portal Act. The case did not in any way involve the basic factual situation that we have in the present case.

Rokey v. Day & Zimmerman, Inc. (Eighth Circuit), 157 Fed. 2d 734, again is a two-platoon system case. Furthermore, this case was decided before the enactment of the Portal to Portal Act and could not possibly be of any help in the present case. Again it is a case from this same Eighth Circuit and has been properly and fully distinguished by the same Court.

Tipton v. Bearl Sprott Co., Inc. (Ninth Circuit), 175 Fed. 2d 432, is another case relied upon by Petitioner. The opinion does not disclose the nature of the activities involved. The question in that case was primarily whether or not the employees were engaged in the production of goods for commerce so as to come within the provisions of the Fair Labor Standards Act. There is a finding in the opinion that the plaintiffs there failed to allege a contract, custom or practice but without any discussion as to the activities involved. Later in the *Biggs case,* from that same Ninth Circuit, hereinabove cited and discussed, that Court had occasion to consider the precise questions involved in the present case and adopted and followed specifically the law as followed by the Court of Appeals in the present case and every other Court of Appeals opinion that we have been able to find wherein the present factual situation existed.

Welsh v. W. J. Dillner Transfer Co. (D. C. Pa.), 91 Fed. Supp. 685, again is a District Court opinion. The opinion fails to detail the activities involved so it is im-

possible to determine whether that court would have held as it did in a factual situation such as we have in the present case It is true that the district judge did not seem to agree with the law as laid down in the above discussed *Conwell* case. But every Court of Appeals in every circuit in the country in which the issue has been squarely presented has, so far as we can determine, followed explicitly the rule of law of this *Conwell* case.

Let us consider next the case of *Williams v. Jacksonville Terminal Co.*, 315 U. S. 386, cited and discussed by Petitioner beginning on page 48 of their Brief. This case apparently is cited in support of Petitioner's contention that the employees in the present case by continuing to work thereby entered into some sort of implied contract to work without pay during this half-hour lunch period. Surely this Court did not lay down any such rule in this Williams case. Here again, the factual situation and the issues involved were entirely different. Let us consider the facts in the present case for a moment. These present Plaintiffs and Respondents constituted practically the entire protection force of this vitally important war plant. They had a choice of continuing work under protest or going on strike. They did the former and declined to take the latter action. Remember this was in 1943 and most of 1944. It was a time when every moment counted. If these employees had gone on strike this entire plant would have been closed down right at the height of the war effort. This war plant could not operate for a moment without this protection. These employees were trained specialists. It would not have been possible to go out and secure other men and women to take their places without considerable training. We cannot conceive

of this or any other court in these circumstances holding that these or any other employees by remaining patriotically on the job under protest instead of going out on strike, thereby forfeited their lawful rights. We think nothing more need be said on this point.

Petitioner cites the Court of Appeals opinion in the Powell case, that is, *United States Cartridge Company v. Powell*, 185 Fed. 2d 67, following the disposition of that case in this Court in the opinion of this Court appearing at 339 U. S. 497. It is quite true that the Court of Appeals in that case made passing reference to a thirty-minute lunch period as being portal to portal in character. However, this statement was made in connection with the reference to activities "before the beginning of the regular shift." There is nothing in this Powell opinion at all contrary to the holding of the same Eighth Circuit Court in the present case when the factual situation is considered. This same Court of Appeals of the Eighth Circuit, both in the *Conwell* case and in the present case, just like the Court of Appeals in every other circuit where the point has been under consideration, has expressly held that when the activities of the employees during any so-called lunch period are, in fact, substantially those of the ordinary workday, then these activities are not portal to portal in character; and that it is not necessary to either plead or prove a contract, custom or practice of payment.

Finally on the points being discussed, Petitioner refers in its brief to the cases of *Armour & Company v. Wantock*, 323 U. S. 126, and *Skidmore v. Swift & Company*, 323 U. S. 134. We certainly find nothing in either

of these cases to support Petitioner's position either in this proceeding or upon the issues of this case in chief. On the contrary, both of these cases clearly support Respondents' position throughout. In the light of these two cases we can see nothing requiring the attention of this Court in the present case.

We quote briefly from the *Skidmore* case as follows:

> "Page 136. 'We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act *is a question of fact* to be resolved by appropriate findings of the trial court. (Emphasis added.)
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> " 'In general, the answer depends "upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work." Hours worked are not limited to the time spent in active labor but include time given by the employee to the employer.' "

We likewise quote from the above mentioned *Wantock* case, pages 132 and 133 of the opinion, as follows:

> " 'It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion.' "

Generally as to the rule applicable, the Court says:

> "Page 133. 'Of course an employer, if he chooses, may hire a man to do nothing or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a

stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.' "

Petitioner in its petition and brief refers to the rule of "De Minimus Non Curat Lex." However, Petitioner cites no authority whatever to support any contention, if any, of Petitioner on this point. This we think is purely a matter within the discretion of the trial court in a case such as the present one. We respectfully direct the attention of the Court to the opinion of the Court of appeals in this case on this as well as other points involved. We also quote briefly from the opinion in a case from the Third Circuit where the amounts and general facts are somewhat similar. This is the case of *Landaas, et al. v. Canister Co., et al.,* 188 Fed. 2d 768. That Court in its opinion, page 771, had this to say:

"The employer makes another argument to the effect that the maxim 'de minimum non curat lex' should be applied here. The basis for this argument is that many of the employees have small claims. They run from $21.67 to $256.88. But it will be noted that the period involved to acquire this much of a claim is three years. The amount accruing for each day is, therefore, very small. The employer gets encouragement from certain words about trivial delays in the portal-to-portal case discussions.

"We think there is nothing to this point. It has been said that the maxim de minimus does not apply to money demands. Kennedy v. Gramling, 1890, 33

S. C. 367, 11 S. E. 1081, 1088. In any event, the maxim is based on common sense and practicalities. The consideration of plaintiffs' claims does not take the court into the realm of the picayune or hypertechnical."

In conclusion, we refer briefly to the specific "Reasons Relied on For Granting the Writ" appearing on page 21 of Petitioner's petition herein.

1. We have demonstrated above that beyond question the Courts of Appeal of the Fourth, Sixth and Ninth Circuits, as well as other holdings of our own Eighth Circuit, are in complete harmony with the holding and rules of law of the Court of Appeals in the present case. We have further demonstrated that there is in fact no authority, when the facts are considered, from any other circuit holding to the contrary. This is particularly true as to the Courts of Appeal of all other circuits. There just is no conflict.

2. No important questions of federal law were decided by the Court of Appeals which have not been or should be settled by this Court. The general rules have all been well settled by prior decisions of this Court as pointed out in the foregoing brief. Furthermore, in view of the uniform holding of all Courts of Appeal in every circuit in which the question has been actually presented, there is clearly nothing remaining requiring the present attention of this Court in this case.

3. There just are no decisions of this Court which in any manner conflict with the holding of the Court of Appeals in this case.

4. The holding of the Court of Appeals affirming the findings of fact of the Trial Court are supported by substantial evidence; and when this evidence is given full consideration these findings of fact not only are not erroneous but just could not be otherwise. Furthermore, Rule 52 of the Federal Rules of Civil Procedure and the many cases decided under this rule dispose of this contention of Petitioner.

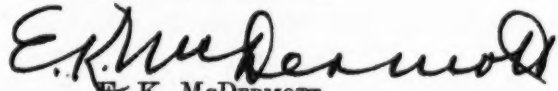
5. What is said in the next preceding paragraph applies equally to Petitioner's Proposition No. 5.

6. There is nothing in this case calling for the application of the rule of "De Minimus Non Curat Lex" and Petitioner cites no authorities supporting its position on this point.

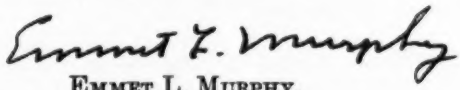
We earnestly suggest, therefore, as stated at the outset of this brief that there is nothing here calling for review by this Court. The whole matter reverts back to the basic determination of the questions of fact. The case was tried to the court without a jury. It was given long and careful study and consideration. The factual situation was determined by the Trial Court. This factual determination was approved by the Court of Appeals. No substantial reason is advanced by Petitioner as to why this Court should review these questions of fact. The questions of law depend upon this determination of the question of fact. When we keep in mind this situation we find that, far from there being any conflict among the Courts of Appeal of the various circuits or with any decisions of this Court, on the contrary, all applicable decisions are in complete uniformity.

Respondents, therefore, respectfully suggest that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



E. K. McDermott,



Emmet L. Murphy,

Attorneys for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 326

THE GLENN L. MARTIN NEBRASKA COMPANY, a Corporation,

Petitioner

vs.

WRENN L. CULKIN, GLEN WEST, FRANCIS H. MASKER, and ALEX FEILMEYER, Individually and as Agents and Representatives to Maintain This Action for and in Behalf of All Employees Similarly Situated,

Respondents.

REPLY BRIEF OF PETITIONER

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Law Briefs — OMAHA LINO-SLUG PRINTING CO. — 419 So. 15th St.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 326

THE GLENN L. MARTIN NEBRASKA COMPANY, a Corporation,

Petitioner

vs.

WRENN L. CULKIN, GLEN WEST, FRANCIS H. MASKER, and ALEX FEILMEYER, Individually and as Agents and Representatives to Maintain This Action for and in Behalf of All Employees Similarly Situated,

Respondents.

REPLY BRIEF OF PETITIONER

If the Court Please:

In the above entitled case, four employees of The Glenn L. Martin Nebraska Company sued as agents and representatives of some 250 employees (207 Guards, 21 firemen, 26 both capacities) to recover overtime for alleged activities during thirty minute lunch periods allowed by the employer, the Petitioner. The periods in-

volved are from March 6, 1943, to September 17, 1944. Only the lunch periods are involved. The suit was brought under Section 16 of the Fair Labor Standards Act. Some twelve employees were produced by the plaintiffs as witnesses. They did not testify in detail as to any particular activities during their own lunch periods or the time consumed by any alleged activities, but sued for the whole thirty minute lunch period.

The Petitioner was engaged in the manufacture of bombing planes during the last war for the U. S. Army, and had some 13,000 or 14,000 persons employed at its plant near Omaha, Nebraska. The plant area was some 700 acres. The guards were stationed at definite posts around the perimeter of the area and within the various buildings. The guards were in three shifts. The Company had provided cafeterias which were available to their employees. The production employees and all employees other than guards and firemen were allowed an identical thirty minute lunch period and were allowed to go to the cafeterias and, of course, were not paid for their lunch period.

Up until March 6, 1943, the guards and firemen were on their posts from seven a. m. to three p. m.; three p. m. to eleven p. m.; eleven p. m. to seven a. m. They were not allowed to go to the cafeterias, and they were not allowed to leave their posts and they were paid for eight hours. On March 6, 1943, by special order and bulletin, it was provided that the first shift of guards should clock in at 6:45 a. m. They were to be on the post at seven a. m. They left their post at three p. m. and clocked out at 3:15 p. m. The schedules for the other two shifts corresponded.

The Bulletin, and order promulgated by the Bulletin, provided:

> "Guards will not be allowed to eat on their posts. They will be allowed thirty (30) minutes for lunch. The Rover in this case when on relief will check the Guard out and in during the lunch period. The Guards will be allowed to eat in the Cafeteria during the lunch period."

The Lower Court found (Printed Record, p. 64) that the employees knew of this order, and knew that they were not to be paid for the thirty minute lunch period.

The Lower Court found there was no contract to pay the guards or firemen for this thirty minute lunch period.

The Lower Court did not find that there was any custom or practice to pay for this lunch period within the meaning of the Portal-to-Portal Act.

The Lower Court, while admitting that there was a diversity of opinion on the subject, held, and this was affirmed by the Circuit Court of Appeals, as follows:

> "This being so, the court has concluded that Section 2 of the Portal Act is inapplicable to this case and that the plaintiffs are not required to plead and prove a contract, custom or practice to compensate them for the hours worked during the lunch period."

The Court of Appeals held the case fell within the rule laid down in the *Central Missouri Telephone Company* case, 170 Fed. (2d) 641.

As heretofore indicated, this suit was brought by four plaintiffs. Glen West was one of them. He testified

(R., page 143) that after March 6th that the guards were permitted to go to lunch to the cafeterias, and were permitted thirty minutes. He testified that that order was posted on a bulletin, and he understood that they were not to be paid for that thirty minutes. His exact testimony is quoted on page 54 of our original Brief.

These guards, as has been said before, were stationed at various posts. At some of the posts there were three or four guards so that they could relieve each other when it came to the lunch period. Every morning the lunch period allowed each guard was posted up. If the guard was to be relieved by a rover or other guard, that fact was included in the bulletin.

It is apparent that if there were three or four guards at a post, one could remain while the others went to lunch. The guards at some of the posts could leave their posts without being watched, and could go to the cafeteria. Some of the guards who were stationed at posts a considerable distance from the cafeterias were relieved by rovers or other employees driving out with jeeps and they were allowed to drive to the cafeteria. There is no dispute in the record as to these facts.

The Lower Court in its Finding of Fact, on page 61 of the Printed Record, found:

> "The system was essentially this: Every day the Company would post a bulletin assigning each guard to a particular post and assign someone to relieve each guard for lunch at a certain time. For the purpose of clarity a representative bulletin has been set forth in the margin. An examination of these bulletins

shows that in many instances a guard would be directed to relieve himself; in other instances a guard would be required to relieve others; and in still other instances, 'Rovers' were assigned to relieve guards for lunch. 'Rovers' were guards whose only duty was to relieve other guards."

In Petitioner's original Brief, commencing on page 54 and running to page 61, there are quotations from the testimony of the plaintiffs' witnesses. These quotations show that after March 6, 1943, the guards were assigned lunch periods. This assignment was posted up every morning in a bulletin, the same bulletin indicated by whom they were to be relieved, and they were allowed to go to the cafeteria, and they did go to the cafeteria.

The plaintiffs alleged in their original Complaint, as follows (Printed Record, page 4):

> "that between the dates of March sixth, 1943, and September sixteenth, 1944, said guards were permitted to leave their posts for a period of thirty minutes each day to enable them to walk to the cafeteria to secure food. * * *"

The undisputed evidence shows that the guards did not take their food out; they ate their food in the various cafeterias. The claim made in the Complaint was that the guards were required while on their way to the cafeteria and while at the cafeteria to "guard the property to ascertain if intruders or strangers were on the premises and were subject to call for any emergency" (Record, pages 4 and 5).

As to the firemen, it was alleged that during the same period they were allowed to go to the cafeteria to secure food, bring the same back to their station and eat.

It was alleged that they were required to be "on the alert for fire duty and were not relieved for any meal hour and were required to be on duty as herein described" (Record, page 6). There were only a few firemen stationed at the firehouse, three or four of them. The other firemen were out on the crash truck for periods of time and were on inspection in the various buildings. These firemen out on inspection went to the cafeterias and ate their lunch at the cafeterias just as the guards did. The plaintiffs introduced testimony to the effect that on occasions very rare indeed the lunch period of a few guards was interrupted, and that they were called to the phone.

The evidence shows that the regular duties of the guards consisted of being stationed at their posts, checking people desiring to come into the plant, checking automobiles, keeping a certain record of it, and generally acting as guards, watching for sabotage and so forth during the war.

The claim was that when they were walking to the cafeteria, they checked badges, and while in the cafeteria they were sometimes called to the phone. No guard testified to more than three or four such episodes, and the Lower Court in its Finding of Fact (Printed Record, pages 62 and 63) found that the instances where a guard was required to take any affirmative action were not relatively great, but the Court held that the fact that the guards were fully uniformed was a deterrent to lawlessness, and was necessarily beneficial to the defendant.

As to the firemen, the Court stated (Printed Record, page 62) that the instances in which affirmative action was required were relatively few, saying that it was nonethe-

less apparent that the firemen were required to be constantly vigilant.

The Circuit Court of Appeals stated that the nature of the activities during the lunch period was to a considerable extent a standby capacity (Additional Record, page 11).

It should be remembered that Section 2, Part II of the Portal-to-Portal Act of 1947 uses these words:

> "No employer shall be subject to any liability • • • under the Fair Labor Standards Act of 1938 as Amended • • • on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either"—
>
> "(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
>
> "(2) A custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-barganing representative and his employer."

The Lower Court and the Court of Appeals came to the conclusion that this Section 2, above-quoted, did not apply unless the work involved was in the nature of preliminary or postliminary work, that is, dressing, going to and from work, and so forth; that it did not apply to employees' regular activities. Part II of the

Portal-to-Portal Act, quoted above, applies to existing claims, that is, for work done before the passage of the Portal-to-Portal Act of 1947. The work involved in the case at bar was from March, 1943, to September, 1944.

The Court will remember that Section 4 of Part III of the Act has to do with future claims, and has to do with claims for activities occurring after the enactment of the Portal-to-Portal Act.

This Section 4 describes the activities which are preliminary or postliminary to the principal activity, *but Section 2 of Part II applies to any* activities.

It is the claim of the Petitioner that before there can be any recovery in the case at bar for these alleged activities during the lunch period, there would have to be established a contract or a custom to pay for them within the meaning of the Portal-to-Portal Act. The Petitioner for Certiorari also asserts that there is a diversity of holdings on this point in the various circuits.

The Lower Court was of the opinion that there was such a diversity of opinion, for the Court said in the opinion on page 674, 97 Fed. Supp.:

> "• • • Counsel for the plaintiff, on the other hand, strenuously urges that, since the activities engaged in during the lunch period were part of the day's principal activities and not preliminary or postliminary in character, Section 2 of the Portal to Portal Act does not apply. Though there is some authority to the contrary in other circuits,[36] the view adopted in our own circuit seems to be in accordance with that suggested by counsel for the plaintiffs."

In the footnote 36, he lists the contra cases as follows:

Seese v. Bethlehem Steel Co. (D. C. Md), 74 F. Supp. 412; *Welsh v. Dillner Transfer Co.* (D. C. Penn., 1950), reported in Commerce Clearing House Labor cases, Vol. 18, Sec. 65, 896. *Amelbo v. Penn Salt Manufacturing Company* (D. C. Penn., 1949), 83 F. Supp. 456; *Shaivety v. Laks, et al.* (D. C. N. Y., 1948), 80 F. Supp. 241.

The Court of Appeals in this case concluded:

"• • • Section 2 of the Portal Act is inapplicable to this case and that the plaintiffs are not required to plead and prove a contract, custom or practice to compensate them for the hours worked during the lunch period."

The opinion of the Court of Appeals is to the effect that in a suit brought under Section 16 of the Fair Labor Standards Act to recover for overtime under that Act, the Portal-to-Portal Act of 1947 does not apply unless the activities were preliminary or postliminary in character. The Court held that for the claimed activities during the lunch period, a recovery could be had under the Fair Labor Standards Act, and that Section 2 of the Portal-to-Portal Act did not apply even though the activities were prior to the passage of the Portal-to-Portal Act in May, 1947. As we have said before, we believe the weight of authority in the Country is to the contrary and that other circuits have held to the contrary. In addition to the cases cited in the District Court's opinion in Note 36, we again call attention to the case of *Battaglia v. General Motors Corporation,* 169 Fed. (2d) 254, which certainly is to the contrary (also the other cases cited in our original brief). This cited case involved activities during *lunch periods and rest periods.* As we have said before, the Court of Appeals and the Lower Court were of the opinion that the *Central Missouri Telephone* case, 170 Fed. (2d) 641, was decisive.

Central Missouri Telephone Company v. Conwell, 170 F. (2d) 641

Various courts have commented on this Telephone case. For instance, in the case of *Welsh v. W. J. Dillner Transfer Co.*, 91 Fed. Supp. 685, the Court said, "the plaintiffs have substantial authority for their position, *Central Missouri Telephone Company vs. Conwell*, 170 Fed. (2d) 641." *On the other hand, the weight of authority appears to be that Section 2 of the Portal-to-Portal Act applies to all claims for overtime.*

In our original brief we cited annotations from 3 A. L. R. (2), p. 1129, and 21 A. L. R. (2), p. 1337. These annotations dealt with the question of whether or not Section 2 of Part II of the Portal-to-Portal Act of 1947 was limited to Portal-to-Portal activities.

We wish to discuss this Conwell case and the background leading up to question involved.

Congress was well aware of this situation when it debated the Portal-to-Portal Act. *Anderson v. Mt. Clemens Pottery Company*, 328 U. S. 680, was merely the precipitating cause of that legislation, and when Congress declared in Section 1 that the FLSA "Has been interpreted judicially in disregard of long-established customs, practices and contracts between employers and employees," it referred to the entire course of interpretation. In Section 10, Congress made liquidated damages no longer mandatory, and in Section 3, it permitted compromises under proper safe-guards, undoing the injustices perpetrated by *Overnight Motor Transportation Co., Inc. v. Missel*, 316 U. S. 572, and *D. A. Schulte, Inc. v. Gangi*, 328 U. S. 108. In Section 8, Congress provided that good faith reliance on administrative rulings and interpretations should constitute a defense to the

employer, contrary to the holding in *Jewell Ridge Coal Corp. v. United Mine Workers,* 325 U. S. 161. In Section 4, so far as the *prospective* operation of the FLSA was concerned, Congress accepted in other respects the interpretations of the Supreme Court, except as to the travel time and preliminary and postliminary activities which were considered "work" in the *Tennessee Coal, Jewell Ridge* and *Mt. Clemens Pottery* cases. In Section 2, however, dealing with *existing claims,* it carefully chose language appropriate to wipe the slate clean and give employers a fresh start in their efforts to comply with the Act. In Section 5 Congress emphasized this policy by putting a short period of limitations on existing claims which could be shown to be founded on contract or custom.

No one can doubt after reading the debate in the Senate that Congress knew exactly what it was doing and intended to bar *all* existing claims, unless founded on contract or custom, and not merely the portal-to-portal type of claim. Senator Aiken raised the question even before Senator Donnell, who had charge of the bill on the floor, commenced his presentation of the bill itself. He said (93 Cong. Rec. p. 2098):

> "There must be a good many times when legitimate suits are brought for back pay. Is the bill going to outlaw the nuisance suits and still make it permissible to bring legitimate suits?"

Senator Donnell, in reply, admitted that the bill might result in some injustice, and that a plaintiff who had failed to collect regular overtime pay due him in the past, would have to show, in order to collect it through the courts, "either that he had a contract or that there was a customary practice in the plant or other place of work in

which he was employed, entitling him to such compensation."

In reply to a question by Senator Lodge, whether the bill did not "run to things other than portal-to-portal matters," Senator Donnell replied that it did (93 Con. Rec., p. 2113).

The following exchange between Senator Lucas and Senator Donnell (93 Cong. Rec., p. 2123) is relevant:

> "MR. LUCAS. I wish to ask the Senator about the bill as it had been reported by the committee, and I have specific reference to section 2 (a) of Part II. I ask him whether he believes that every conceivable claim based on any activity not compensable by contract or custom or practice, is wiped out by the bill. I am now talking about all claims, over and beyond those which are set forth in the portal-to-portal suits, and I wish to know whether the bill included such claims.
>
> MR. DONNELLL. The answer, Mr. President, is that the section to which the Senator from Illinois has referred destroys every claim * * * except those that were compensable by either contract, custom, or practice, as described in that section.
>
> MR. LUCAS. Then the Senator from Missouri and I are in agreement as to what this section means. In other words, any and all claims, over and above and beyond anything that has happened in these portal-to-portal suits, are also wiped out or outlawed, so to speak.
>
> If my position is correct in that respect, I wish to make this further statement for the record: namely, that the section we are discussing contains no definition of portal-to-portal claims, and makes no distinction between suits based on out-and-out violations of the Fair Labor Standards Act * * * and the portal-to-portal suits."

Senator Donnell, explaining the difficulties encountered in drafting the bill, had this to say (93 Cong. Rec., p. 2132):

"Finally we came to the conclusion * * * that instead of making our bill apply to the 24 hour period, around the clock, we would make it apply only to the period preceding the beginning of the normal workday and subsequent to the end of the normal workday—what might be termed the whistle-to-whistle period. So we started to make all activities prior to the beginning of the workday compensable only if so under a contract or custom, and to make all activities after the conclusion of the workday compensable only if so under contract or custom, leaving the broad field of the workday itself, the great bulk of the time, with no new legislation applicable to it * * *.

"Then we were confronted by these considerations * * * that if we should not legislate with reference to the shift period, that is to say, between whistle and whistle, we would still leave unattained our object to wipe out the portal-to-portal suits. For illustration, in connection with lunch time, as I remember it, it was alleged in the Mt. Clemens case by the employees that they were entitled to compensation from the time they left their work places to the time they reached the cafeteria, and for the time spent in returning * * *. If we adopted the plan of legislating as to existing claims merely with respect to activities before the beginning of the workday and after the end of the workday, in all probability there would still be left pending in the courts a great mass of suits * * *.

"I have gone into this subject at great length because I think it is exceedingly important as showing that Congress, when it legislates to affect the rights of persons other than those who have engaged in portal-to-portal activities and to affect rights other than those accruing from Portal-to-Portal activities, is not acting capriciously or arbitrarily, but within

its sound discretion is using what the Congress deems to be the best practical approach to demolishing the portal-to-portal cases."

Senator Lucas again raised the point that Section 2 (a) wiped out "every conceivable claim based on any activity not compensable by contract, custom or practice," and this time Senator Ferguson answered him as follows (Cong. Rec., p. 2234):

> "I answer by saying that it is the intent of the section referred to to abolish every known claim that could exist under the Fair Labor Standards Act, the Walsh-Healy Act, or the Bacon-Davis Act—specifically under the acts and by virtue of nothing else than the acts—except claims which may arise under any express or implied contract * * * I think it was the intention of the drafters of the legislation to wipe out everything under those acts that was not based upon contract or custom or practice. That was the intention."

Senator McCarran, launching a bitter attack on the bill, said (93 Cong. Rep., p. 2244):

> "The worst feature of the majority bill is that it thoroughly emasculates the Fair Labor Standards Act, not only with respect to portal-to-portal claims, and not only with respect to all past claims, but also with respect to future claims."

Senator McGrath, also opposed, had this to say (93 Cong. Rec., p. 2248):

> "Why do I say that? Because the committee itself admits that under the language of the bill many inequities are possible. The committee itself admits that in trying to write an over-all rule for the conduct of American business, involving the so-called workday and workweek, we are probably ruling out the valid claims of many American workingmen so that they shall no longer have a forum in which

> they can press their claims regardless of how right they may be or how just they may be or how unjust or cruel the employer. By this bill we give forgiveness of the sins of the many employers who have abused their workers, and we place a premium on that kind of action at the expense of the vast majority of American Employers who have been loyal and fair in dealing with their workers."

When *Central Missouri Telephone Co. v. Conwell,* supra, was in the District Court on motion to dismiss, 74 F. Supp. 542, Judge Duncan had before him the debate in the Senate and noted that apparently "it was the intention of the Congress to wipe out every existing claim except those that had arisen under contract, written or unwritten, express or implied, or pursuant to custom or practice." The he seized upon the term "implied contract," used by Senator Ferguson in replying to Senator Lucas but not found in the Act, and proceeded to imply a contract from the fact that the plaintiffs had worked many hours of overtime without being paid in accordance with the FLSA. He argued in support of this implied contract only that an arrangement under which overtime work was performed without payment was illegal and not binding on the employee. Even Judge Duncan's sense of logic balked at stating the naked syllogism. Major premise: a contract for overtime work without payment is illegal. Minor premise: the parties are not bound by an illegal contract. Conclusion: Therefore a contract to pay for overtime work is implied.

The court made short work of the same argument in *Newsom v. E. I. Dupont de Nemours & Co.,* 173 F. (2d) 856, 860. There a written contract provided that "time and one-half or double time will be paid when required by law or Government regulation," thus incorporating the

FLSA by express reference, and not merely by implication. As the Court pointed out, however, one purpose of the Portal-to-Portal Act was to repeal the Supreme Court's interpretation of the FLSA as to what activities constituted "work." To read the FLSA into the contract between the parties, including the Supreme Court's interpretation of that Act, "would nullify both the purpose and the provisions of the Portal-to-Portal Act." It is obvious, of course, that Judge Duncan's device of implying a contract to pay for overtime work in accordance with the FLSA, carried to its logical conclusion, would absolutely nullify the Portal-to-Portal Act in every case.

When *Central Missouri Telephone Co. v. Conwell* reached the Court of Appeals, 170 F. (2d) 641, the judges of that court agreed with Judge Duncan, and cited in support of his conclusion an interpretative bulletin of the Administrator of the Wage and Hour Division of the Department of Labor and the remarks of President Truman on the occasion of signing the Portal-to-Portal Act. The Administrator quoted the sponsors of the Act as saying that it "protects the legitimate claims," and therefore concluded that Congress did not intend to change the general rule that the remedial provisions of the Fair Labor Standards Act should be liberally construed and exemptions therefrom narrowly construed. The President said that he was "confident that the purpose of the main provisions of the Act is to eliminate the immense potential liabilities which have arisen as a result of the 'portal-to-portal' claims," and that it was "not the purpose of the Act to permit violation of our fundamental wage and hour standards or to allow a lowering of those standards.

—

It is undisputed that in the case at bar, whatever activity or requirement of availability there may have been during the lunch periods involved, the claimants did not expect to be paid for their lunch periods. They knew that the lunch periods were not to be paid for.

In Section 1 (a) (4) of the Portal-to-Portal Act, Congress found that one of the evils of the FLSA, as interpreted by the Supreme Court, was that "employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay," and in Section 1 (a) (5) Congress found that if the FLSA were permitted to stand as interpreted, it would promote "increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in." These and other evils were found to burden and obstruct commerce, and in Section 1 (b) Congress declared its policy "to relieve and protect commerce from practices which burden and obstruct it * * *."

The Court will remember that Section 2 of the Portal-to-Portal Act provides that there should be no liability for *"any"* activity engaged in prior to the date of the enactment of the Act, except activities compensable by either (1) an *express* provision of *a written or non-written contract,* in effect at the time of such activity between such employee, his agent, or collective bargaining representative and his employer."

In the case at bar the Lower Court found that:

"The Company stopped paying for activities engaged in during the lunch period and the employees

continued to work with the knowledge that they were not being paid for this time." (Printed Record, page 64.)

One of the plaintiffs, Glen E. West, testified as follows:

"Q. After March 6, 1943, you were permitted to go to lunch at the Cafeteria and permitted thirty minutes? A. That was right.

Q. That was posted as a bulletin? A. Yes.

Q. Of course, you weren't to be paid for that thirty minutes, you understand that?

A. That is right." (Printed Record, page 143.)

In addition, Respondents in their brief herein in referring to the testimony of Alex Feilmeyer (page 15 of Respondent's brief) say:

> "The men through an organization were making complaints about the fact that our pay was not being based on eight and one-half hours. I never did agree with Martin or any one else that I was entitled to only eight hours pay for that period of time."

Again in the brief it is stated that complaints were made by the employees about not receiving pay for the thirty minute lunch period, and that these complaints continued until September, 1944, when a different arrangement was made.

It is apparent that in this case there was not any contract, express or implied, to pay the men for the lunch period. As a matter of fact, they understood they were not being paid for the lunch period and claimed that through their organizations they objected.

The record discloses that in *September, 1944*, the following Bulletin was posted, being Exhibit 38, Printed Record, pages 120 and 121:

> "To All Guards and Firemen from L. H. Krumm, Guards Eating Lunch on their Post. Effective with the second shift September 17, 1944, it will be required that all men eat their lunch on their post of duty, and not go to the cafeteria to eat lunch. No deduction shall be made thereafter for the usual lunch period.
>
> L. H. Krumm."

During the period involved from March 6, 1943, until September 17, 1944, there was a directive to the timekeeping department which read at follows:

> "All guards will be allowed thirty minutes lunch period, the lunch period is to be deducted from the time shown on the time card.
>
> "This will mean that all guards will have eight and one-half hours shown on their time cards, but will be credited with eight hours only."

Again the Court in his Findings of Fact found as follows (see Printed Record, page 64):

> "The plaintiffs have alleged that the activities engaged in during the lunch period were compensable throughout the period in question 'under the general non-written contract in effect between defendant and each of said employees.' The evidence, however, does not support this allegation; consequently, the court is unable to find that the activities were compensable by contract."

Your Petitioner again submits to the Court that both the Lower Court and the Court of Appeals erred in coming to the conclusion that Section 2 of the Portal-to-Portal Act did not apply.

In Respondents' Brief appears the following language:

> "It is conceivable that a situation might arise in which the activities involved were not exactly portal to portal in character and yet were not the normal activities of the regular workday. In such a situation perhaps it is necessary under Section 2 of the Portal to Portal Act to clearly and specifically plead and prove such contract, custom or practice, but that is not the situation here."

The Court's findings as herein set out indicate the regular activities of the guards. The claimed and alleged activities during the lunch period are certainly different from the regular activities as found by the Court. We, therefore, submit that under any view of the case, the plaintiffs were required to prove either a contract or a custom as required by Section 2 of the Portal-to-Portal Act.

REPLY TO COMMENTS ON FACTS BY RESPONDENTS

We do not believe that the comments as to the facts made in Respondents' Brief are accurate. In the Lower Court's Opinion as hereinbefore quoted, he set forth on page 61 of the Printed Record the practice in re the thirty minute lunch periods. On page 11 of Respondents' Brief it is said:

> "When any witnesses in answer to questions upon cross examination made any statement to the effect that they could have a half hour lunch period, etc., they were referring to the specific paper directive."

The record does not at all support this statement. For instance, one of the plaintiffs, Alex Feilmeyer, on page 131 of the record testified as follows:

"Q. When you did go to a cafeteria to eat, did you have full half hour at any time? (This was a question propounded by Mr. Murphy, Counsel for the plaintiff)

A. If you weren't called away, yes you would have your half hour."

This witness also testified as follows:

"Then after this March 6, 1943, you were permitted to go to the cafeteria? A. Yes.

Q. And you would go, of course, to the Cafeteria that was nearest you at Modification? A. Yes."

Again he testified:

"Q. When it came to lunch, you were again relieved by a Rover and went to the cafeteria? A. Yes.

Q. And you were allowed thirty minutes for this lunch? (Record, pages 132, 133 and 134).

A. Yes."

Angeline E. Way

She was called as a witness by the plaintiff and testified:

"Q. You knew after you came to work you were entitled to thirty minutes to go to lunch to a cafeteria? A. That is right.

• • •

Q. If you wanted to you could sit in the Cafeteria the whole thirty minutes?

A. That is right, if you weren't called.

• • •

Q. During all the time you were employed there, you were called out of the lunch period twice?

A. That is right." (Record, pages 146, 147.)

William A. Keefer

He was called as a witness for the plaintiff and testified:

"A. Yes, I think after March 6, 1943, we were permitted to be relieved by a Rover and to eat in the Cafeteria. (Record, page 124.)

Q. Do you remember when you were a guard of ever being called when you were at lunch in the Cafeteria? A. Called away from the cafeteria?

Q. Yes.

A. No, I can't remember of any instance." (Record, pages 127, 128.)

The record discloses that these guards and firemen during their shift period were allowed two rest periods of ten minutes. These rest periods were not deducted from their time (Record, page 126).

Mr. Murphy in the trial of the case was attempting to prove that while they were at lunch the claimants were interrupted at times, and called away. But as said before, during the eighteen months involved no one of them was called away more than two or three times. Surely the activity of the guard seated at lunch and eating his lunch in a cafeteria, provided by his employer, is different in character from the guard's activities when he is at his post checking automobiles and persons in and out of the plant, checking railroad cars, and generally doing other guard duties. The Lower Court and the Circuit Court of Appeals attempted to avoid the consequences of the Portal-to-Portal Act by asserting that the guards were doing their regular work because of the fact that while eating their lunch in the cafeteria they had their complete uniforms on. The plaintiffs tried to prove that

they had some duties as to checking badges while on their way to the cafeteria or entering the cafeteria, but this faded away and there was a lack of evidence to establish any such activities. One of the witnesses testified that on one occasion he checked a badge. The truth is, and the record without dispute establishes it, that after March 6, 1943, and until September 16, 1944, the guards could go to the cafeteria for their lunch, were relieved so that they could do so, and those who were stationed at distant posts were transported to the cafeteria. They availed themselves of this period. There was no contract or custom to pay them for this thirty minute period. The record discloses an attempt on the part of some twelve claimants to try to establish that the guards or firemen performed some activities during this thirty minute lunch period. However, the attempts were so feeble that on cross-examination it was established that only on the very rarest occasions while the guards were at lunch was their lunch interfered with. This also is true as to the firemen. For the information of the Court we advise that there were 207 claimants who were guards and 21 who were firemen, and 26 who served in both capacities.

On page 247 of the Printed Record the Court took over the examination of a witness by the name of Al Wolf. The following questions were asked by the Court, also the answers of the witness:

> "Q. Likewise it is true that this order of March 6, 1943, the guards had thirty minutes in which to eat their lunches, it was made available to them and they could go to the cafeteria and if they were disturbed they took it at another time if they cared to? A. Yes.
>
> Q. And there isn't any doubt about that? A. No, sir."

We call attention of the Court to the Printed Record commencing on page 183. This is a photostatic copy of the Daily Report made by the Production Department (pages 183 to 201) covering the guards. The Fire Department report appears on pages 202, 203, 204, and on page 208 appears the assignment of the firemen to their various duties. On page 185 of the Printed Record appears a copy of the bulletin showing the assignment of the various guards to their various posts and lunch reliefs and by whom they were to be relieved.

It appears that in September, 1944, the entire plant voted to go on a two shift schedule of nine hours each, instead of the three shift schedule so that the welders and other workers might have a little more take home pay (Record, pages 165-166). The evidence is that in order to give the guards and firemen some additional take home pay, it was agreed effective September 16, 1944, that they would again eat their lunch on their post and not go to the cafeteria and for this period they would be paid and they would be paid for eight and one-half hours (Record, pages 166, 167). Again the approval of the Air Corps was obtained for this change. The letter approving the change appeared on page 176 of the printed Record. The pertinent part of the letter is as follows (Record, page 167):

> "I. Consideration has been given to the proposal contained in referenced letter regarding the contractor's desire to allow plant protection guards to eat their lunch at their posts during their tour of duty in order to eliminate the necessity for relief guards to replace such personnel while on a regularly scheduled lunch period.
>
> "2. The undersigned approves the above mentioned procedure with the provision that the guards

will not be allowed to leave their posts to eat lunch at any of the eating facilities in operation at the premises, that they be required to have lunch at their regular station of duty. This procedure to become effective on and after 17 September, 1944.

"For the A. A. F. Representative: J. T. Reymonds, 1st Lt., Air Corps Contracting Officer."

"The testimony of Mr. Robert L. Evans, who was the personnel director of the defendant, is that he took up the matter with the unions representing the guards and firemen and made this change so that the guards and firemen could likewise have some increase in take-home pay to correspond with current increases available to all the other employees." (Record, page 166.)

As to the duty of the guards the Lower Court in its Finding of Fact held (see page 60 of the Printed Record):

"The primary function of a guard, irrespective of his particular station at the plant, involved constant vigilance for the security of the defendant's property. Each guard, however, had certain specific duties, routine in character, which were, in a sense at least, related to the individual post, e. g. the guards at the main gate were required to examine the credentials of all persons seeking admittance to the plant; the guard at the water tower was required to take a water reading every twenty minutes; and the guard on freight inspection duty was required to check incoming carloads of freight."

The Court likewise in its Finding of Fact held:

"when the guards were relieved for lunch they could go either to the nearest cafeteria or to the smoking area." (Printed Record, page 62.)

As has been said before, the Lower Court held there was no contract to pay either the guards or firemen for

their lunch period. This appears on page 64 of the Printed Record. The Lower Court likewise found the following fact:

> "the Company stopped paying for activities engaged in during the lunch period and the employees continued to work with the knowledge that they were not being paid for this time." (page 64.)

Your Petitioner again asserts that the Lower Court's findings that the claimants were performing their ordinary work during the lunch period was clearly erroneous within the meaning of Rule 52 of the Federal Rules of Procedure.

CONCLUSION

For the reasons set forth in this Brief and the reasons set forth in our original Brief, Petitioner respectfully prays for a Writ of Certiorari to the Court of Appeals for the Eighth Circuit to review the decision of that Court in the above entitled case.

Respectfully submitted

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Omaha, Nebraska,

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Office - Supreme Court, U.
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 326

THE GLENN L. MARTIN NEBRASKA COMPANY, a Corporation,

Petitioner,

vs.

WREN L. CULKIN, GLEN WEST, FRANCIS H. MASKER, and ALEX FEILMEYER, Individually and as Agents and Representatives to Maintain This Action for and in Behalf of All Employees Similarly Situated,

Respondents.

PETITION FOR REHEARING

J. A. C. KENNEDY, Omaha, Nebraska,
GEORGE L. DELACY, Omaha, Nebraska,
LEO EISENSTATT, Omaha, Nebraska,
DONALD LEACH, Columbus, Ohio,
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Law Briefs — OMAHA LINO-SLUG PRINTING CO. — 413 So. 18th St.

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WREN L. CULKIN, GLEN WEST, FRANCIS H. MASKER, and ALEX FEILMEYER, Individually and as Agents and Representatives to Maintain This Action for and in Behalf of All Employees Similarly Situated,

Respondents.

PETITION FOR REHEARING

Your Petitioner, The Glenn L. Martin Nebraska Company, a corporation, prays for a rehearing of the order of this Court dated October 27, 1952, denying its Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BASIC FACTS

This is an action brought by four employees of The Glenn L. Martin Nebraska Company, as agents and repsentatives of 207 guards and 21 firemen and 26 others

who had served in both capacities to recover overtime and liquidated damages under Section 16 of the Fair Labor Standards Act. There were some 13,000 or 14,000 employees at this plant where bombers were made during the last war. The date involved is from March 16, 1943, to September 16, 1944. The claim is for payment for a thirty minute lunch period which was allowed to the guards under an order and bulletin dated March 6, 1943, which provided that after that date the guards would have a thirty minute lunch period, would have their lunch at the cafeterias, and would be relieved where relief was necessary. There is no dispute but that the guards were allowed this thirty minute lunch period; that some of them were transported to the cafeterias. The claim was made that during the lunch period, they wore their uniforms and that they acted in a standby capacity.

The defense raised was that under Section 2 of the Portal-to-Portal Act of 1947, there was no contract or custom as required by the Portal-to-Portal Act.

The Lower Court, as a Finding of Fact, found that there was no contract; found that the guards and firemen knew that they were not being paid for the thirty minute lunch period. The Court did not find that there was any custom, but the Court found that there was no need to plead a contract or custom under the Portal-to-Portal Act of 1947, this because the Lower Court found that the activities performed during the lunch period were not preliminary or postliminary.

The Court relied upon the case of *Central Missouri Telephone Company vs. Conwell,* 170 Fed. (2d) 641.

ARGUMENT

Petitioner assigns the following reason for granting this Petition—

There is a conflict in the decisions of the various circuits, as to whether or not it is necessary to plead and prove a contract or custom to pay in accordance with Section 2 of the Portal-to-Portal Act of 1947. That there was such a conflict was found by the Lower Court, the Lower Court saying in its opinion—

> "* * * Counsel for the plaintiff, on the other hand, strenuously urges that, since the activities engaged in during the lunch period were part of the day's principal activities and not preliminary or posliminary in character, Section 2 of the Portal to Portal Act does not apply. Though there is some authority to the contrary in other circuits,[36] the view adopted in our own circuit seems to be in accordance with that suggested by counsel for the plaintiffs."

In the footnote 36, he lists the contra cases as follows:

> "*Seese v. Bethlehem Steel Co.* (D. C. Md.), 74 F. Supp. 412; *Welsh v. Dillner Transfer Co.* (D. C. Penn., 1950), reported in Commerce Clearing House Labor cases, Vol. 18, Sec. 65,896. *Amelbo v. Penn Salt Manufacturing Company* (D. C. Penn., 1949), 83 F. Supp. 456; *Shaivety v. Laks, et al.* (D. C. N. Y., 1948), 80 F. Supp. 241."

Your Petitioner prepared a Reply Brief in answer to Respondents' Brief in Opposition to a Petition for Writ of Certiorari. This Brief set forth the comments of the Lower Court to the effect that there was a diversity of holding and contained a complete analysis of the *Central Missouri Telephone Company v. Conwell* case, supra,

and contained quotations from the Congressional Record, showing the debate which was carried on in the United States Senate relative to the meaning of Section 2 of the Portal-to-Portal Act, which debate is set forth in your Petitioner's Reply Brief; that said Reply Brief was prepared in accordance with the rules of this Court, was served upon counsel for the Respondents, and was forwarded to this Court for filing. However, because of the delay in transportation, this Reply Brief arrived in Washington and in the Clerk's office on October 28th, 1952, the day after the order of this Court denying certiorari.

We believe that a reading of this Reply Brief would have convinced the Court that both the Lower Court and the Court of Appeals were wrong in their construction of Section 2 of the Portal-to-Portal Act of 1947, and were wrong in holding that said Act was not applicable to the case at bar.

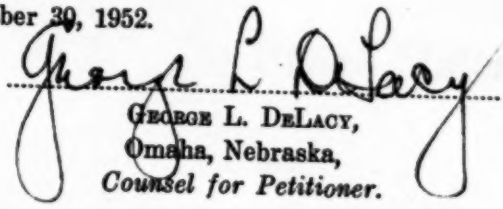
We believe likewise that a reading of said Reply Brief would convince the Court that there was actually a diversity of holdings on the point involved as between the various circuits, and that the Lower Court was likewise of the opinion that there was such a diversity.

CONCLUSION

For the foregoing reason, Petitioner respectfully prays that the order of the Court denying its Petition for a Writ of Certiorari to the Court of Appeals for the Eighth Circuit be re-heard and vacated, and that the Petition be granted, and your Petitioner prays that the said Reply Brief received by the Clerk of the Supreme Court of the United States on the 28th day of October, 1952, be

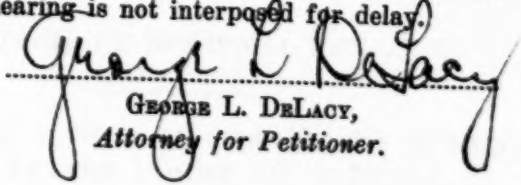
considered by the Court and that it be filed in the office of the Clerk of the Court.

Dated: October 30, 1952.



GEORGE L. DELACY,
Omaha, Nebraska,
Counsel for Petitioner.

The undersigned, G. L. DeLacy, attorney for the Petitioner, hereby certifies that the Petition for Rehearing filed in this cause is presented in good faith, that in his judgment said Petition is restricted to the grounds specified in paragraph 2 of Rule 33 as amended, and that said Petition for Rehearing is not interposed for delay.



GEORGE L. DELACY,
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